

1 BOIES SCHILLER FLEXNER LLP

2 David Boies (admitted pro hac vice)
 333 Main Street
 Armonk, NY 10504
 Tel: (914) 749-8200
 dboies@bsflp.com

5 Mark C. Mao, CA Bar No. 236165
 Beko Reblitz-Richardson, CA Bar No.
 238027
 6 44 Montgomery St., 41st Floor
 San Francisco, CA 94104
 Tel.: (415) 293-6800
 mmao@bsflp.com
 brichardson@bsflp.com

9 James Lee (admitted pro hac vice)
 Rossana Baeza (admitted pro hac vice)
 10 100 SE 2nd St., 28th Floor
 Miami, FL 33131
 Tel.: (305) 539-8400
 jlee@bsflp.com
 rbaeza@bsflp.com

14 Alison L. Anderson, CA Bar No. 275334
 M. Logan Wright, CA Bar No. 349004
 15 725 S Figueroa St., 31st Floor
 Los Angeles, CA 90017
 Tel.: (213) 995-5720
 alanderson@bsflp.com
 mwright@bsflp.com

SUSMAN GODFREY L.L.P.

Bill Carmody (admitted pro hac vice)
 Shawn J. Rabin (admitted pro hac vice)
 Steven M. Shepard (admitted pro hac vice)
 Alexander Frawley (admitted pro hac vice)
 1301 Avenue of the Americas, 32nd Floor
 New York, NY 10019
 Tel.: (212) 336-8330
 bcarmody@susmangodfrey.com
 srabin@susmangodfrey.com
 sshepard@susmangodfrey.com
 afrawley@susmangodfrey.com

Amanda K. Bonn, CA Bar No. 270891
 1900 Avenue of the Stars, Suite 1400
 Los Angeles, CA 90067
 Tel.: (310) 789-3100
 abonn@susmangodfrey.com

MORGAN & MORGAN

John A. Yanchunis (admitted pro hac vice)
 Ryan J. McGee (admitted pro hac vice)
 201 N. Franklin Street, 7th Floor
 Tampa, FL 33602
 Tel.: (813) 223-5505
 jyanchunis@forthepeople.com
 rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805
 711 Van Ness Ave, Suite 500
 San Francisco, CA 94102
 Tel: (415) 358-6913
 mram@forthepeople.com

19 **UNITED STATES DISTRICT COURT**
 20 **NORTHERN DISTRICT OF CALIFORNIA**

21 CHASOM BROWN, WILLIAM BYATT,
 JEREMY DAVIS, CHRISTOPHER
 22 CASTILLO, and MONIQUE TRUJILLO
 individually and on behalf of all other similarly
 23 situated,

24 Plaintiffs,

25 v.

26 GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' NOTICE OF MOTION
 AND MOTION TO EXCLUDE CERTAIN
 GOOGLE EMPLOYEE WITNESSES**

Judge: Hon. Yvonne Gonzalez Rogers

Date: October 13, 2023

Time: 9:00 a.m.

Location: Courtroom 1 – 4th Floor

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	2
II. BACKGROUND.....	3
A. Google Omits the Four Employees from its Initial Disclosures and Discovery Responses, So They Never Become Document Custodians.	3
B. Even After Substantially Completing Document Production, Google <i>Still</i> Does Not Disclose the Four Employees.	5
C. Google Belatedly Discloses Ganem and Levitte at the <i>End</i> of Fact Discovery, but <i>Not</i> McPhie or Sadowski.	5
D. Plaintiffs Meet Sadowski through the Sanctions Proceedings; Google <i>Still</i> Does Not Disclose Her.	6
E. Google Omits Sadowski, McPhie, and Levitte from Yet Another Disclosure....	7
III. LEGAL STANDARD	8
IV. ARGUMENT	9
A. Google Did Not Comply with its Disclosure Obligations.....	9
B. Google's Failure to Comply Was Not Substantially Justified.....	10
C. Plaintiffs Have Been Prejudiced, and Exclusion Is Warranted..	11
V. CONCLUSION	15

TABLE OF AUTHORITIES

		Page(s)
1		
2		
3	Cases	
4	<i>Epic Games, Inc. v. Apple Inc.</i> , 2021 WL 1375860 (N.D. Cal. Apr. 12, 2021) (Gonzalez Rogers, J.)	13
5		
6	<i>Garcia v. Qwest Corp.</i> , 2008 WL 4531657 (D. Ariz. Oct. 3, 2008)	14
7		
8	<i>Markson v. CRST Int'l, Inc.</i> , 2021 WL 5969519 (C.D. Cal. Nov. 23, 2021)	10, 11, 14
9		
10	<i>Mass Probiotics, Inc. v. Aseptic Tech. LLC</i> , 2017 WL 10621233 (C.D. Cal. Dec. 21, 2017).....	9
11		
12	<i>Ollier v. Sweetwater Union High Sch. Dist.</i> , 768 F.3d 843 (9th Cir. 2014)	3, 12, 14
13		
14	<i>Rodman v. Safeway, Inc.</i> , 2015 WL 5315940 (N.D. Cal. Sept. 11, 2015)..... <i>passim</i>	
15		
16	<i>Shenwick v. Twitter, Inc.</i> , 2021 WL 1232451 (N.D. Cal. Mar. 31, 2021)	14
17		
18	<i>Trulove v. D'Amico</i> , 2018 WL 1090248 (N.D. Cal. Feb. 27, 2018) (Gonzalez Rogers, J.)	9
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 PLEASE TAKE NOTICE that on October 13, 2023, at 9:00 a.m., the undersigned will
2 appear before the Honorable Yvonne Gonzalez Rogers of the United States District Court for the
3 Northern District of California to move the Court to preclude certain Google employees from
4 testifying at trial. This Motion is made under Federal Rules of Civil Procedure 26 and 37 and
5 Civil Local Rule 7, and it is based on this Notice of Motion and Motion, the accompanying
6 Memorandum of Points and Authorities, the concurrently filed declaration of Alexander Frawley
7 and accompanying exhibits, all matters of which the Court may take judicial notice, other
8 pleadings and papers on file in this action, and other written or oral argument that Plaintiffs may
9 present to the Court.

10 **ISSUE TO BE DECIDED**

11 Whether the Court should exclude trial witnesses whom Google did not timely disclose
12 and for whom Google did not produce custodial documents?

13 **RELIEF REQUESTED**

14 Plaintiffs respectfully ask the Court to exclude the following Google current and former
15 employees from testifying at trial: Caitlin Sadowski, Jonathan McPhie, George Levitte, and Steve
16 Ganem.

17 Dated: September 8, 2023

18 By: /s/ Mark Mao

1 **I. INTRODUCTION**

2 At trial, Google as of now plans to call eight current or former employees. *Half were not*
 3 *document custodians in this case, nor properly disclosed by Google*, including:

- 4 • Caitlin Sadowski, a current Google employee who Google says will testify about
 “how Incognito works”
- 5 • Jonathan McPhie, a former Google employee who Google says will testify about
 Google’s “disclosures”
- 6 • George Levitte, a current Google employee who Google says may testify about
 “the way Google earns revenue from Google Ad Manager”
- 7 • Steve Ganem, a current Google employee who Google says will testify about
 “how Google Analytics works”

8 Ex. 1 at 16-17. These are obviously relevant topics that have been litigated since Day 1.

9 *Yet Google did not disclose Sadowski or McPhie under Rule 26(a) until the day it served*
 10 *its trial witness list—August 17, 2023—three years after the case was filed.* Ex. 2. *Google*
 11 *omitted all four witnesses from an interrogatory response served early in this case* that
 12 Plaintiffs used to select document custodians, where Google identified employees with
 13 “knowledge of” “Incognito mode,” Google’s “privacy policies,” and Google’s collection of data
 14 by way of “Google Analytics” and “Google Ad Manager.” Ex. 3 at 5-6; Ex. 4. Because of
 15 Google’s failure to timely identify these employees, none of Sadowski, McPhie, Levitte, or
 16 Ganem became document custodians. Permitting Google to call these witnesses would require
 17 Plaintiffs to cross examine *half* of Google’s fact witnesses without custodial productions.

18 Google is changing course at the last minute, lining up witnesses whom Google shielded
 19 from document production while opposing testimony from employees who were document
 20 custodians. For example, in the interrogatory response mentioned above, Google identified
 21 [REDACTED] as employees responsible for and knowledgeable about
 22 Incognito mode. Ex. 4 at 5. Plaintiffs included [REDACTED] on their witness list, but
 23 Google has informed Plaintiffs that it will oppose live testimony from those two employees.

24 The disclosure rules exist to prevent Google’s gamesmanship. When “a party fails to
 25 provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed

1 to use that information or witness . . . at trial, unless the failure was substantially justified or is
 2 harmless.” *Rodman v. Safeway, Inc.*, 2015 WL 5315940, at *2 (N.D. Cal. Sept. 11, 2015). There
 3 should be no dispute that Google did not comply with its disclosure obligations. Exclusion is
 4 warranted because Google cannot prove that its failure to comply was substantially justified or
 5 harmless. The “theory of disclosure under the Federal Rules” is to enable parties to “conduct
 6 discovery of what [] witnesses would say on relevant issues, which in turn informs the party’s
 7 judgment about which witnesses it may want to call at trial, either to controvert testimony or to
 8 put it in context.” *Ollier v. Sweetwater Union High Sch.*, 768 F.3d 843, 862 (9th Cir. 2014). For
 9 half of its witnesses, Google has deprived Plaintiffs of that opportunity. Google’s gamesmanship
 10 is particularly egregious with respect to Sadowski, whom Plaintiffs encountered through the
 11 sanctions proceedings, where Google never said it would rely on her outside those proceedings.

12 II. BACKGROUND

13 A. Google Omits the Four Employees from its Initial Disclosures and 14 Discovery Responses, So They Never Become Document Custodians.

15 There is no excuse for Google’s failure to disclose the four employees, particularly
 16 because their topics have been relevant since day one:

- 17 • “how Incognito works” (Sadowski)
- 18 • Google’s “disclosures,” including the “Privacy Policy” (McPhie)
- 19 • “the way Google earns revenue from Google Ad Manager” (Levitte)
- 20 • “how Google Analytics works” (Ganem)

21 Ex. 1 at 16-17. Plaintiffs’ initial Complaint referenced the Google Privacy Policy, and it
 22 identified “Google Analytics” and “Google Ad Manager” as the “means” by which Google
 23 surreptitiously tracks users’ private browsing data. Dkt 1 ¶¶ 4, 29-30.

24 Google’s initial Rule 26(a) disclosures predictably addressed these *same topics*:

- 25 • “the purpose and function of the Chrome browser’s Incognito mode”
- 26 • “Google’s disclosures regarding Incognito mode”, among others
- 27 • “Information concerning functionality of Google Ads Manager”
- 28 • “Information concerning functionality [] of Google Analytics”

1 Ex. 5 at 2-3. But Google did not disclose any of the four employees at issue in this motion. Google
 2 instead identified five other employees, ***none of whom are on Google's trial witness list.***

3 Google also omitted the four employees from its written discovery responses, which were
 4 used to select document custodians. Plaintiffs on February 26, 2021 served an interrogatory
 5 asking Google to identify "current and former . . . employees . . . with responsibility for or
 6 knowledge of" various topics, including the ***same topics*** the four employees seek to testify about:

- 7 a) "Google's Incognito mode, including its purpose and functions"
- 8 b) "Google's privacy policies and representations regarding private browsing"
- 9 c) "Google's collection of and use of data . . . including with respect to . . . Google
 Analytics [and] Google Ad Manager."

10 Ex. 3 at 5-6. In response, on March 29, 2021, Google identified [REDACTED] for subpart (a)

11 [REDACTED] for subpart (b) [REDACTED] for subpart

12 (c) [REDACTED] But Google once again omitted the four employees.

13 Ex. 4 at 5-7. While the four employees were included in a list of [REDACTED] people that Google produced
 14 on February 1, 2021, that list contained no information about any employees' knowledge and
 15 only listed names, job divisions, titles, and managers. Ex. 6.

16 Plaintiffs relied on Google's Rule 26(a) disclosures and interrogatory response to make
 17 their custodian selections. The parties specifically discussed the importance of Google's
 18 interrogatory response during meet-and-confers about custodians. As memorialized by Plaintiffs
 19 in a March 1, 2021 letter:

20 That [list of [REDACTED] employees] unfortunately does not provide sufficient detail to fully
 21 assess who the Google custodians should be in this case. . . . During the February 24
 22 meet and confer, you suggested that it may be more useful for Plaintiffs to seek this
 23 information by way of an interrogatory. Plaintiffs have now served an interrogatory . . .

24 Ex. 13 at 5. Plaintiffs again stressed the importance of that interrogatory in a joint letter brief
 25 filed with the Court: "Plaintiffs are currently evaluating a list of Google employee names
 26 produced by Google, with limited information regarding those employees, and Plaintiffs have
 requested more information *by way of an interrogatory.*" Dkt. 127 at 1 n.1 (emphasis added). All

1 [REDACTED] Google employees identified in Google’s initial Rule 26(a) disclosures and interrogatory
 2 response became document custodians (among others).¹ The four employees did not.

3 **B. Even After Substantially Completing its Document Production, Google
 4 Still Does Not Disclose the Four Employees.**

5 On October 4, 2021, Google served an amended interrogatory response that identified [REDACTED]
 6 new Google employees: [REDACTED] more employees for the “Incognito” subpart, [REDACTED] more for the
 7 “disclosures” subpart, and [REDACTED] more for the subpart addressing “Google Analytics” and “Google
 Ad Manager.” Ex. 7 at 12-14.² Google again did not identify the four employees.

8 The timing of this supplement was critical. It came *two days* before Google’s deadline to
 9 substantially complete document production. At that point, there was still time for Plaintiffs to
 10 secure additional document productions, with three months left in fact discovery (which would
 11 later become five months when discovery was extended). All [REDACTED] of the employees listed in
 12 Google’s supplemental interrogatory response were already document custodians, so there was
 13 no need for Plaintiffs to request additional productions based on that response.

14 **C. Google Belatedly Discloses Ganem and Levitte at the End of Fact
 15 Discovery, but Not McPhie or Sadowski.**

16 Google served amended Rule 26(a) disclosures on February 21, 2022—long after the
 17 October 6, 2021 deadline for substantially completing document production and just two weeks
 18 before the (extended) close of fact discovery. These disclosures *still omitted Sadowski and*
 19 *McPhie*, but Google did identify Levitte and Ganem. Ex. 8. Over Google’s objection, Magistrate
 20 Judge van Keulen ordered their depositions, reasoning that “Google should have added these
 21 persons to its initial disclosures several months ago.” Dkt. 454-1 at 2. But the depositions were
 22 limited to 3.5 hours, and Plaintiffs’ request for custodial productions was denied.

23 Plaintiffs subsequently raised concerns about McPhie, Levitte, and Ganem in connection
 24 with class certification. After Google submitted declarations from them with its class certification

25 ¹ Some employees were included in both Google’s initial disclosures and its interrogatory
 26 response, and some employees were listed for multiple subparts within the interrogatory
 response.

27 ² Some employees were again listed for multiple subparts within the interrogatory response.

1 opposition, Plaintiffs moved to strike those declarations as undisclosed expert opinions and
 2 alternatively based on Google’s failure to properly disclose them as fact witnesses. *See* Dkt. 704-
 3 2. This Court denied the motion but permitted Plaintiffs “to depose the witnesses on the topics
 4 contained in their declarations to the extent relevant.” Dkt. 803 at 11 n.5. The parties agreed to
 5 defer Levitte’s deposition, but Plaintiffs deposed Ganem and McPhie on their declarations. Still,
 6 none of these employees became document custodians.

7 Throughout this process, Google *still did not disclose McPhie under Rule 26(a)*. Google
 8 only disclosed its intent to call McPhie as a trial witness last month, on August 17, 2023. Had
 9 Google disclosed McPhie earlier—even belatedly after his March 2023 deposition—Plaintiffs
 10 could have sought additional relief from the Court, including document productions. Google
 11 deprived Plaintiffs of that opportunity.

12 **D. Plaintiffs Meet Sadowski through the Sanctions Proceedings; Google *Still*
 13 Does Not Disclose Her.**

14 Plaintiffs learned about Sadowski through the sanctions proceedings that unfolded in
 15 Spring 2022—shortly after the close of fact discovery.³ Those proceedings concerned Google’s
 16 concealment of its private browsing detection bits, which are fields Google uses to identify and
 17 label private browsing data. Google hid these bits until February 2022, when Plaintiffs uncovered
 18 one of them (maybe_chrome_incognito) through a last-minute document production. Dkt. 588-1
 19 (May 20, 2022 Sanctions Order) ¶¶ 110-12, at p 22-23. Plaintiffs then served a notice seeking to
 20 depose a corporate representative about any additional private browsing detection bits.
 21 *Id.* ¶¶ 118-21. Google designated Sadowski for that deposition, which took place after the close
 22 of fact discovery *id.*, and Sadowski later testified for Google at the April 21, 2022 sanctions
 23 hearing. Plaintiffs served that 30(b)(6) notice to learn about “any” incognito detection bits (Ex.

24 ³ Plaintiffs included both Sadowski and McPhie on their initial draft witness list, but in doing so,
 25 Plaintiffs clarified they would call these witnesses to present documents in the event the parties
 26 cannot agree on admissibility. Ex. 1. Plaintiffs later amended their witness list to clarify they are
 27 willing to drop both Sadowski and McPhie (among other witnesses) if the parties reach an
 agreement relating to the admissibility and use of certain documents, and the Court approves
 such an agreement. *See* Ex. 9 at 12.

1 10 at 6), but it has now become clear that Sadowski and Google neglected to disclose at least one
 2 of those detection bits—[REDACTED] bit, which Google concealed until December
 3 2022. *See* Dkt. 898 (March 2023 Sanctions Order) at 17.

4 Magistrate Judge van Keulen granted Plaintiffs' motion for sanctions in part, finding that
 5 "Google's unjustified failure to provide information regarding the Incognito-detection bits during
 6 discovery was improper and constitutes discovery misconduct." Dkt. 588-1 ¶ 155, p. 29. Among
 7 other sanctions, Magistrate Judge van Keulen granted Plaintiffs' request under Federal Rule 37(c)
 8 to preclude Google from relying on various undisclosed witnesses. *Id.* ¶¶ 61-62, p. 45. Plaintiffs
 9 did not include Sadowski in their preclusion request in part because Google never informed
 10 Plaintiffs that it would rely on her going forward. Another reason was that Sadowski lacks
 11 personal knowledge about the detection bits. At the sanctions hearing, she confirmed that her
 12 knowledge was based entirely on speaking with other Google employees (including an employee
 13 whom the court precluded Google from relying on) and a source code search she conducted in
 14 preparation for her Rule 30(b)(6) deposition. Ex. 12 at 211:21-212:2; *see also id.* at 214:1-12
 15 (Court striking as hearsay statement from Sadowski that "I talked to Mark about this particular
 16 document, and he clarified that . . .").

17 But since Google apparently intended to rely on Sadowski at trial, Google should have
 18 amended its Rule 26(a) disclosures or its interrogatory response to disclose her. Had Google done
 19 so, Plaintiffs could have sought to preclude her testimony as well. Magistrate Judge van Keulen's
 20 reasoning for excluding the other witnesses applies equally to Sadowski: "Sanctions are
 21 appropriate under Rule 37(c) because Google violated Rule 26(e) when it failed to disclose
 22 [various employees] in response to Plaintiffs' interrogatory." *Id.* Alternatively, Plaintiffs could
 23 have sought production of Sadowski's custodial documents.

24 **E. Google Omits Sadowski, McPhie, and Levitte from Yet Another Disclosure.**

25 On April 15, 2022, the deadline for opening expert reports, Google identified six
 26 employees as "percipient witnesses with technical expertise who may also testify at trial." Ex.
 27 11. That disclosure was required by this Court's Standing Order. *See* Standing Order in Civil
 28

1 Cases ¶10 (“Any percipient witness who may also testify at trial with technical expertise akin to
 2 an independent expert shall be identified by name no later than the date of expert disclosures to
 3 allow for deposition, if necessary.”).

4 Google identified Ganem but not Sadowski, McPhie, or Levitte; yet Google’s trial
 5 witness list states that all three will address technical subjects. Google asserts that Sadowski will
 6 address “how Chrome works, how Incognito works, [REDACTED], and [whether certain] data
 7 is . . . joined to Google accounts,” and other “subject matters discussed at her deposition” (i.e.,
 8 incognito detection bits). Ex. 1 at 17. Google says McPhie will address “how Incognito mode
 9 [purportedly] provides privacy.” *Id.* at 16. And Google says Levitte will address “the way Google
 10 earns revenue from Google Ad Manager.” *Id.* at 17. These subjects are technical, which is why
 11 Google’s hired experts are also addressing them. *See id.* at 19 (Google expert Zervas will testify
 12 about “how private browsing works”; Google expert Psounis will address whether Google
 13 “join[s] authenticated with unauthenticated data”; Google expert Strombom will address
 14 damages). At a minimum, Google should have included Sadowski, McPhie, and Levitte on its
 15 list of percipient witnesses with technical expertise. While still untimely, an April 2022
 16 disclosure would have allowed for document productions. Google instead waited until the eve of
 17 trial to disclose its actual witnesses, swapping out previously disclosed individuals (who were
 18 document custodians) for these undisclosed individuals (who were not document custodians).

19 **III. LEGAL STANDARD**

20 “Federal Rule of Civil Procedure 26(a)(1) requires a party to identify, without waiting for
 21 a discovery request, the identity of all potential witnesses and the purposes for which they may
 22 be called. Rule 26(e)(1) further provides that a party has a duty to supplement its earlier
 23 disclosures when they are incorrect or incomplete.” *Rodman*, 2015 WL 5315940, at *2. The same
 24 duty to supplement applies to interrogatory responses. Fed. R. Civ. P. 26(e)(1).

25 Federal Rule of Civil Procedure 37(c)(1) “gives teeth to [these requirements] by
 26 forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not
 27 properly disclosed.” *Trulove v. D’Amico*, 2018 WL 1090248, at *2 (N.D. Cal. Feb. 27, 2018)

1 (Gonzalez Rogers, J.) (citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106
 2 (9th Cir. 2001)). “If a party fails to provide information or identify a witness as required by Rule
 3 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a
 4 motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”
 5 Fed. R. Civ. P. 37(c)(1). “The sanction of exclusion is ‘self-executing’ and ‘automatic,’” and “the
 6 burden is on the party facing the sanction to demonstrate that the failure to comply . . . is
 7 substantially justified or harmless.” *Truelove*, 2018 WL 1090248, at *2 (quoting *Yeti by Molly*,
 8 259 F.3d at 1106). Rule 37(c) grants trial courts “wide latitude” to exclude improperly disclosed
 9 witnesses. *Yeti by Molly*, 259 F.3d at 1106. “No showing of bad faith or willfulness is required.”
 10 *Mass Probiotics, Inc. v. Aseptic Tech., LLC*, 2017 WL 10621233, at *3 (C.D. Cal. Dec. 21, 2017).

11 IV. ARGUMENT

12 A. Google Did Not Comply with its Disclosure Obligations.

13 Google did not comply with its disclosure obligations under both the Federal Rules and
 14 this Court’s Standing Order. *Half* of the employees on Google’s list were not properly disclosed:

- 15 • Sadowski: Google omitted her from
 - 16 ○ (1) its initial and amended Rule 26(a) disclosures,
 - 17 ○ (2) its interrogatory responses, and
 - 18 ○ (3) its list of percipient witnesses with technical expertise.
- 19 • McPhie: Google omitted him from
 - 20 ○ (1) its initial and amended Rule 26(a) disclosures,
 - 21 ○ (2) its interrogatory responses, and
 - 22 ○ (3) its list of percipient witnesses with technical expertise.
- 23 • Levitte: Google omitted him from
 - 24 ○ (1) its initial Rule 26(a) disclosures,
 - 25 ○ (2) its interrogatory responses, and
 - 26 ○ (3) its list of percipient witnesses with technical expertise.

- 1 • Ganem: Google omitted him from
 2 ○ (1) its initial Rule 26(a) disclosures, and
 3 ○ (2) its interrogatory responses.

4 Google's eleventh-hour disclosure of McPhie and Sadowski in August 2023 (on the same
 5 day it served its trial witness list) does not absolve Google. That disclosure at most complies with
 6 Google's pretrial obligations under Rule 26(a)(3), which is an *additional* requirement. "Rule
 7 26(e) requires the parties to supplement all their Rule 26(a) disclosures in a timely manner, which
 8 includes their Rule 26(a)(1) discovery disclosures. Rule 26(a)(3)'s [pretrial disclosures] language
 9 makes clear that its requirements are '[i]n addition to' those of Rule 26(a)(1)." *Markson v. CRST*
 10 *Int'l, Inc.*, 2021 WL 5969519, at *2 (C.D. Cal. Nov. 23, 2021) (excluding belatedly disclosed
 11 fact witnesses) (quoting Fed. R. Civ. P. 26(a)(3)(A)). Nor does it matter that Google disclosed
 12 Ganem and Levitte under Rule 26(a) at the end of fact discovery. "By waiting until the close to
 13 discovery to disclose witnesses defendant should have identified much earlier, defendant's
 14 disclosure was not timely." *Id.* at *3. "[D]isclosures of witnesses must be made sufficiently in
 15 advance of the close of discovery for the party-opponent to have a reasonable opportunity to
 16 pursue discovery of these witnesses." *Id.* at *2.

17 In any event, even if Google were found to have complied with Rule 26(a) (which it did
 18 not), Google independently violated paragraph 10 of the Court's Standing Order by omitting
 19 Sadowski, McPhie, and Levitte from its list of percipient witnesses with technical expertise. In
 20 addition, it is undisputed that Google never amended its interrogatory response to add any of
 21 these four employees, which means Google (at a minimum) violated Rule 26(e) for all four
 22 witnesses. There should be no dispute about that violation.

23 **B. Google's Failure to Comply Was Not Substantially Justified.**

24 There is no excuse for Google's failure to comply with its disclosure obligations.
 25 "Substantial justification is justification to a degree that could satisfy a reasonable person that
 26 parties could differ as to whether the party was required to comply with the disclosure request."
 27 *Rodman*, 2015 WL 5315940, at *2. Google cannot credibly argue that it did not need to disclose

1 these four witnesses, including (1) under Rule 26(a), (2) in response to Plaintiffs' interrogatory,
 2 and (3) as percipient witnesses with technical expertise.

3 Google "has made no showing it could not have discovered these witnesses (its
 4 employees) earlier." *Markson*, 2021 WL 5969519, at *4. Even if Google had no way of knowing
 5 about its own employees at the beginning of the case (which cannot be true), Google missed
 6 numerous opportunities to disclose each of them. Google became aware of Sadowski (at latest)
 7 in March 2022 when it designated her as the Rule 30(b)(6) witness on certain private browsing
 8 detection bits. Yet Google did not include her in its April 15, 2022 list of percipient witnesses,
 9 and Google did not disclose her under Rule 26(a) until nearly ***18 months later***, on the same day
 10 Google served its trial witness list. Google became aware of Ganem and Levitte (at latest) in late
 11 2021 when it served declarations from them in the related *Calhoun* case, where the same law
 12 firm represents Google. *Calhoun* Dkts. 430-9, 430-15. Yet Google did not include them in its
 13 October 2021 interrogatory response, and Google did not include Levitte in its April 15, 2022
 14 list of percipient witnesses with technical expertise. Finally, Google was aware of McPhie (at
 15 latest) in Summer 2022 as it prepared his class certification declaration. Dkt. 666-12. Yet Google
 16 did not disclose him under Rule 26(a) until ***over a year later***, on the same day Google served its
 17 trial witness list. And Google never supplemented its interrogatory response to include any of
 18 these employees. For all four, Google had ample opportunities to comply with its obligations but
 19 repeatedly failed to do so.

20 **C. Plaintiffs Have Been Prejudiced, and Exclusion Is Warranted.**

21 Google also cannot meet its burden to prove harmlessness. The "theory of disclosure
 22 under the Federal Rules" is to enable parties to "conduct discovery of what [adverse] witnesses
 23 would say on relevant issues, which in turn informs the party's judgment about which witnesses
 24 it may want to call at trial, either to controvert testimony or to put it in context." *Ollier*, 768 F.3d
 25 at 862. That is why "[c]ompliance with Rule 26's disclosure requirements is mandatory." *Id.*

26 *Ollier* is on point. The trial court excluded 38 witnesses under Rule 37(c)(1) because the
 27 defendant "[w]ait[ed] until long after the close of discovery and on the eve of trial to disclose"

1 them. *Id.* at 852 (first alteration in original) (quoting lower court decision). There was “no reason
 2 why any of the 38 witnesses were not disclosed to [P]laintiffs either initially or by timely
 3 supplementation.” *Id.* at 862 (quoting trial court). The Ninth Circuit affirmed, reasoning that
 4 “[a]n adverse party should not have to guess which undisclosed witnesses may be called to testify.
 5 We . . . have warned litigants not to indulge in gamesmanship with respect to the disclosure
 6 obligations of Rule 26.” *Id.* at 863 (citation omitted).

7 Exclusion here is warranted for the same reasons. Google’s failure to comply with its
 8 disclosure obligations prevented Plaintiffs from “conduct[ing] discovery of what [these]
 9 witnesses would say on relevant issues.” *Id.* That outcome is unfair, particularly where it did not
 10 need to be this way. Had Google disclosed these witnesses even by its October 6, 2021 substantial
 11 completion deadline (when Google amended its interrogatory response), there would have been
 12 enough time for Plaintiffs to request that they become document custodians. Instead, Google
 13 directed Plaintiffs to other witnesses on these same topics, and Google now seeks to bar Plaintiffs
 14 from having some of those witnesses appear live at trial. As to these four employees, exclusion
 15 is warranted because Plaintiffs have “been deprived of the opportunity to prepare for trial.”
 16 *Rodman*, 2015 WL 5315940, at *2 (excluding belatedly disclosed fact witness).

17 Plaintiffs’ prior depositions do not remedy the prejudice. Sadowski was deposed solely
 18 as a Rule 30(b)(6) witness on limited topics and without being a document custodian. Plaintiffs
 19 deposed McPhie without him being a document custodian and only about his class certification
 20 declaration. Google’s focus at class certification was on implied consent, a defense that cannot
 21 be asserted against the Rule 23(b)(2) classes. Ganem’s class certification deposition is
 22 insufficient for similar reasons. It is one thing to depose a witness for purposes of opposing a
 23 confined declaration in connection with class certification or summary judgment. Preparing for
 24 cross examination at trial is very different, and Plaintiffs have been prejudiced by Google’s lack
 25 of custodial productions for these individuals.

26 This Court has previously recognized the importance of custodial productions for cross
 27 examination. *See Epic Games, Inc. v. Apple Inc.*, 2021 WL 1375860, at *2 (N.D. Cal. Apr. 12,
 28

1 2021) (Gonzalez Rogers, J.). In that case, Apple moved to exclude third-party witnesses,
 2 contending they were belatedly disclosed and that Epic Games was “coordinating with the[]
 3 third-party witnesses to prevent Apple from obtaining” their documents. *Id.* This Court denied
 4 the motion, reasoning that “there has been no violation of the Rule 26 disclosure requirements”;
 5 “Epic Games promptly disclosed the individual identifies . . . when [it] learned that these three
 6 individuals were confirmed to be appearing at” trial. *Id.* at *2. That result is of course
 7 distinguishable because this motion concerns Google’s failure to disclose *its own* employees—
 8 not third-party witnesses over whom Google lacks knowledge or control.

9 But this Court’s remarks on the importance of document productions are instructive for
 10 this motion.

11 [T]he failure to produce relevant documents, including documents relevant to the
 12 individual testifying witness, to both parties (here, to Apple) will be factored into the
 13 individual witness’ credibility, and, if necessary, may warrant the striking of testimony.
 14 To the extent that the third-party witnesses are concerned with an adverse credibility
 15 determination at the bench trial, they should ensure that they adequately and timely
 16 produce such documents in advance of their depositions.

17 *Id.* at *2. The presence of a jury makes custodial documents even more important for this case.
 18 Unlike in *Epic*, where there was no jury, the Court can’t level the playing field on its own.

19 Plaintiffs’ prejudice as to Sadowski is particularly stark. Magistrate Judge van Keulen
 20 has already precluded Google from relying on employees with personal knowledge of its
 21 incognito detection bits, whom Google did not properly disclose. As explained in her May 2022
 22 sanctions order, “Google’s failure to identify these witnesses was not harmless because it
 23 undermined Plaintiffs’ ability to obtain full discovery into these Incognito-detection bits.” Dkt.
 24 588-1 ¶ 62, p. 45. During the second round of sanctions proceedings in March 2023, Magistrate
 25 Judge van Keulen precluded Google from relying on additional employees, reasoning that
 26 “presumably some or all of these witnesses would have been disclosed during the normal course
 27 of discovery had Google been forthcoming in identifying logs containing Incognito-detection
 28 bits.” Dkt. 898 at 14. Google is now seeking to unwind those orders by backfilling with Sadowski.

1 As for all four witnesses, it is also too late to cure Plaintiffs' prejudice with additional
 2 discovery. Even if Google were amenable to a full document production and deposition for each
 3 witness, “[i]t is very unlikely that this work could be completed and incorporated into the parties’
 4 pretrial preparations quickly enough to begin trial [] as currently scheduled.” *Rodman*, 2015 WL
 5 5315940, at *2. Even if it were possible to complete that work, “plaintiffs would be deprived of
 6 the ability to conduct any necessary follow up discovery pertaining to these witnesses, as
 7 plaintiffs could have done had the witnesses been timely disclosed.” *Markson*, 2021 WL
 8 5969519, at *4.

9 In any event, requiring Plaintiffs to move quickly to review new documents only
 10 exacerbates their prejudice. “The last thing a party or its counsel wants in a hotly contested
 11 lawsuit is to make last-minute preparations and decisions on the run.” *Ollier*, 758 F.3d at 863.
 12 To make Plaintiffs engage in more discovery “would render Rule 37 toothless.” *Garcia v. Qwest*
 13 *Corp.*, 2008 WL 4531657, at *4 (D. Ariz. Oct. 3, 2008). If parties could evade their disclosure
 14 obligations by dumping documents at the eleventh hour, every party would be incentivized to do
 15 exactly what Google did here. That approach cannot be reconciled with the Federal Rules, whose
 16 “obvious purpose . . . is to enable the opposing party to prepare to deal with the individual’s
 17 evidence in the case.” *Shenwick v. Twitter, Inc.*, 2021 WL 1232451, at *2 (N.D. Cal. Mar. 31,
 18 2021) (excluding trial testimony of employee-witnesses not disclosed during discovery). These
 19 arguments apply with particular force to Sadowksi, where Plaintiffs are starting from square
 20 one—having never deposed her in her individual capacity.⁴

21 Finally, while irrelevant to the analysis, exclusion will not significantly prejudice Google
 22 (and perhaps not at all). Other employees on its witness list who became document custodians
 23 can cover the topics allocated to the excluded employees. For example, Greg Fair plans to testify

24 ⁴ Plaintiffs on August 25 asked Google to produce custodial documents for these four witnesses.
 25 Frawley Decl. ¶¶ 16-18; Ex. 14. Google is “considering” that request. *Id.* As of this filing, Google
 26 has not yet informed Plaintiffs whether it will produce the documents. But for the reasons
 27 described above, compliance would not fully cure Plaintiffs’ prejudice. Plaintiffs nevertheless
 look forward to Google’s response. Plaintiffs are filing this motion now, including to ensure it
 can be noticed for the October 13 pretrial conference on a normal briefing schedule.

1 about Google's disclosures. Ex. 1 at 16-17. Glenn Berntson plans to testify about Google Ad
2 Manager, and Bruce Strombom (a disclosed expert) plans to address damages. *Id.* at 16. Adriana
3 Porter Felt will address how Incognito works, and so will disclosed expert Georgios Zervas
4 (Sadowski's topic) *Id.* at 17, 19. Google can and should rely on these witnesses. To the extent
5 Google argues the four employees possess unique knowledge, that only underscores Plaintiffs'
6 prejudice and demonstrates why exclusion is appropriate.

7 **V. CONCLUSION**

8 Plaintiffs respectfully ask the Court to preclude the following Google current and former
9 employees from testifying at trial: Caitlin Sadowski, Jonathan McPhie, George Levitte, and Steve
10 Ganem.

11 Dated: September 8, 2023
12

13 By /s/ Mark Mao
14

Mark C. Mao (CA Bar No. 236165)
mmao@bsflp.com

Beko Reblitz-Richardson (CA Bar No. 238027)
brichardson@bsflp.com
BOIES SCHILLER FLEXNER LLP
44 Montgomery Street, 41st Floor
San Francisco, CA 94104
Telephone: (415) 293 6858
Facsimile (415) 999 9695

David Boies (*pro hac vice*)
dboies@bsflp.com
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
Tel: (914) 749-8200

James W. Lee (*pro hac vice*)
jlee@bsflp.com
Rossana Baeza (*pro hac vice*)
rbaeza@bsflp.com
BOIES SCHILLER FLEXNER LLP
100 SE 2nd Street, Suite 2800
Miami, FL 33130
Telephone: (305) 539-8400
Facsimile: (305) 539-1304

1 Alison Anderson (CA Bar No. 275334)
2 aanderson@bsflp.com
3 M. Logan Wright, CA Bar No. 349004
4 mwright@bsflp.com
5 BOIES SCHILLER FLEXNER LLP
725 S Figueroa Street
31st Floor
Los Angeles, CA 90017
Telephone: (213) 995-5720

6 Amanda Bonn (CA Bar No. 270891)
7 abonn@susmangodfrey.com
8 SUSMAN GODFREY L.L.P.
9 1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 789-3100

10 Bill Christopher Carmody (*pro hac vice*)
11 bcarmody@susmangodfrey.com
12 Shawn J. Rabin (*pro hac vice*)
13 srabin@susmangodfrey.com
14 Steven Shepard (*pro hac vice*)
sshepard@susmangodfrey.com
15 Alexander P. Frawley (*pro hac vice*)
afrawley@susmangodfrey.com
16 Ryan Sila (*pro hac vice*)
rsila@susmangodfrey.com
17 SUSMAN GODFREY L.L.P.
18 1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
Telephone: (212) 336-8330

19 John A. Yanchunis (*pro hac vice*)
jyanchunis@forthepeople.com
20 Ryan J. McGee (*pro hac vice*)
rmcgee@forthepeople.com
21 MORGAN & MORGAN, P.A.
22 201 N Franklin Street, 7th Floor
Tampa, FL 33602
23 Telephone: (813) 223-5505
Facsimile: (813) 222-4736

24 Michael F. Ram, CA Bar No. 104805
25 mram@forthepeople.com
26 MORGAN & MORGAN
27 711 Van Ness Ave, Suite 500
San Francisco, CA 94102

1 Tel: (415) 358-6913
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Attorneys for Plaintiffs